

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Emergency Complaint of)
Dennis J. Kucinich)
)
v.)
)
Cable News Network)
)
and)
)
Time Warner, Inc.)
)

MEMORANDUM OPINION AND ORDER

Adopted: January 18, 2008

Released: January 18, 2008

By the Chief, Media Bureau:

1. We have before us an emergency complaint filed on January 18, 2008, by U.S. Representative Dennis J. Kucinich and Kucinich for President 2008, Inc., his official presidential campaign committee (“Kucinich”), against Cable News Network and Time Warner, Inc., owner of Cable News Network (“CNN”). Kucinich states that he is a “serious candidate for office of the President of the United States” and “is actively and vigorously campaigning in South Carolina.” Kucinich asserts that he has been excluded from a “prime-time Democratic candidate presidential primary debate” to be aired on CNN on January 21, 2008. Kucinich requests that the Commission find CNN to be in violation of Section 315 of the Communications Act and order CNN to allow Kucinich to participate in CNN’s nationally-televised debate on January 21, 2008 in South Carolina. Applying the principles articulated in our prior decisions, and the congressional intent underlying the equal opportunities provision of Section 315, we deny the complaint.¹

2. Cable television operators have wide discretion in choosing the programming that is available on a cable system. The First Amendment of the U.S. Constitution and federal law generally prohibit the Commission from involving itself in the content of specific broadcast or cable television

¹ In light of our ruling herein that the debate scheduled for January 21, 2008, appears to satisfy the requisites for the on-the-spot coverage of a bona fide news event, we find it unnecessary to consider whether the equal opportunities requirements set forth in Section 315 apply to cable programming aired by CNN.

programs or otherwise engaging in activities that might be regarded as censorship of programming content.²

3. Section 315(a) of the Act provides that if a licensee allows a legally qualified candidate for public office to use a broadcast station, it must afford equal opportunities to other such candidates for that office. Section 315(a) also states, however, that appearances by legally qualified candidates on four categories of *bona fide* news programming, including on-the-spot coverage of *bona fide* news events (Section 315(a)(4)), are exempt from equal opportunities requirements. In *Aspen Institute*,³ the Commission adopted a two-part test for analyzing whether a program should be considered *bona fide* news event programming. First, it determined whether the format of the program reasonably fit within the news event exempt category and, second, it assessed whether the decision to carry a particular news event was the result of good-faith news judgment and not based on partisan purposes. The Commission has continued to use the *Aspen Institute* analysis for cases involving the news event exemption.⁴ Applying that analysis, the Commission has held that debates are exempt from the equal opportunities provision of Section 315 in that they are considered to be on-the-spot coverage of *bona fide* news events.⁵ In addition, debates may be sponsored or initiated by broadcasters, candidates, third parties, and others and remain exempt from the equal opportunities provision.⁶ In applying the second prong of the *Aspen Institute* analysis to broadcaster-sponsored debates, the Commission has explained that “*Aspen Institute* did not establish any requirement that all so-called ‘major’ or ‘serious’ candidates participate in order for the debate to come within the exemption. A station is free to choose its participants, provided that its intent is not to further the candidacy of any particular individual.”⁷

4. Kucinich argues that his exclusion from the debate “undermines the purpose of the Communications Act, and is a blatant violation of the Act, including its equal time provisions as it does not fall under any exemption found in Section 315(a).” He argues that the debate cannot be characterized as a *bona fide* news event unless it covers all credible candidates, including him. He also argues that “CNN is violating its obligation to operate in the public interest and allow for discussion of conflicting views” as his exclusion from the debate results in the exclusion of “strong anti-war and national health care messages.” Kucinich further argues that the debate does not fall within the news event exemption because his participation in the debate was previously guaranteed by one of the debate’s sponsors, the Congressional Black Caucus, and because “Kucinich is the only Democratic presidential candidate who has qualified for Federal matching funds who is being excluded.” Kucinich further asserts that CNN’s action violates the second part of the *Aspen Institute* test—that the decision to carry the debate is the result of good faith news judgment—because “Kucinich has wide-spread support, as shown by his ability to obtain Federal matching funds and his victories in national online polls.”

² U.S. CONST., amend. I; 47 U.S.C. § 326. See also *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813-15 (2000).

³ *Aspen Institute*, 55 FCC 2d 697 (1975), *aff’d sub nom, Chisolm v. FCC*, 538 F.2d 349 (D.C. Cir. 1976), *cert. denied*, 97 S. Ct. 247 (1976).

⁴ See, e.g., *In re Complaint of Ross Perot v. ABC, CBS, NBC, and Fox Broadcasting Co.*, 11 FCC Rcd 13109 (1996); *Fox Broadcasting Company*, 11 FCC Rcd 11101 (1996).

⁵ *Chisholm v. FCC*, 538 F.2d 349, 358 (D.C.Cir.), *cert. denied*, 429 U.S. 890 (1976).

⁶ *Henry Geller*, 95 FCC 2d 1236 (1983), *aff’d sub nom., League of Women Voters v. FCC*, 731 F.2d 955 (D.C. Cir. 1983).

⁷ *Letter to George A. Lato, Esq.*, 6 FCC Rcd 5840 (Mass Media Bur. 1991), *citing American Independent Party*, 62 FCC 2d 4 at n.3 (1976).

5. As a threshold matter, the Commission does not have authority to grant Kucinich's request that the Commission order CNN to include him in the subject debate. As stated previously, the Commission is prohibited from engaging in activities that might be regarded as censorship of programming content. Requiring a particular candidate to be included in a debate would constitute such activity and, therefore, is prohibited. Even when Section 315(a) applies, the cable operator or broadcast station is only obligated to afford equal opportunities to the candidate; the candidate is not entitled to appear in the same program as his opponent.

6. Applying the terms of the statute and the *Aspen Institute* test to Kucinich's arguments regarding the debate's qualifications for the "news event" exemption, we conclude that, based on the record before us, CNN's debate is exempt from equal opportunities under Section 315(a). In *Aspen Institute* and consistently since, the Commission has found, with the approval of the courts, that debates between at least two competing legally qualified candidates are exempt news events. Thus, the first part of the *Aspen Institute* test is satisfied here. Kucinich's arguments - that he was previously guaranteed participation in the debate by one of the debate sponsors, and that he is the only candidate to receive Federal matching funds to be excluded - are unpersuasive. These arguments have no basis in statutory law or commission precedent. In particular, we fail to perceive how the initial guarantee is relevant to whether the format of the program reasonably fits within the news event exemption category.

7. As to the second prong, Kucinich also fails to show that CNN's action is an abuse of discretion or intended to further the candidacy of any particular individual. The evidence set forth in Kucinich's complaint falls far short of the strict standard established by Commission precedent for challenging the selection of candidates to appear in an event which a broadcaster claims is exempt from equal opportunities under Section 315(a)(4). According to the complaint, CNN applied the following criteria for candidate participation in the debate: (1) finishing in the top four in any of the early primaries or caucuses and (2) polling five percent or more in a recent L.A. Times California poll or five percent in any of approximately ten recent national polls. Kucinich has not shown that CNN's criteria are unreasonable, nor does he maintain that they were chosen to promote the candidacy of a particular candidate. Kucinich also fails to present any evidence to show that CNN's choice of criteria was not based on the newsworthiness of the event. Although the Commission has expressed concern that a candidate who, "based on objective criteria such as polling results," could demonstrate that he or she was a "major presidential candidate" not be excluded from a debate,⁸ Kucinich has not presented objective evidence sufficient to demonstrate that he is a "major presidential candidate" under Commission precedent.⁹ Kucinich has provided no information regarding his rating in the polls, nor is there any indication that the polls were biased or deceptive in any way.¹⁰ The fact that Kucinich has strong and perhaps distinct views on certain issues does not have any bearing on the application of *Aspen Institute*

⁸ *King Broadcasting Co.*, 6 FCC Rcd 4998, 4999 (1991).

⁹ Evidence that Mr. Kucinich's candidacy is "credible" or has "wide-spread support" is insufficient under Commission precedent. See *Arthur R. Block, Esq.*, 7 FCC Rcd 1784, 1785 (Mass Media Bur. 1992) (complaint by Dr. Lenora B. Fulani challenging broadcasters' selection of candidates to appear in a televised debate did not demonstrate that she was a major presidential candidate in the absence of polling information, despite the fact that she was legally qualified and notwithstanding evidence of the amount of money that she raised, the number of American citizens who contributed to her campaign, and the fact that 5,225 people signed a petition protesting her exclusion).

¹⁰ See *Letter to George A. Lato, Esq.*, 6 FCC Rcd at 5841 (broadcaster-sponsored debates qualified for an exemption under Section 316 as bona fide news events where broadcaster imposed 7% of votes in polling as cut-off point for excluding candidates and excluded candidate presented no evidence that that choice was unreasonable or of his own rating in the polls).

analysis. In light of the manifest newsworthiness of a debate between candidates for the presidential nomination of a major party, the apparently objective criteria on which participation in this debate is based, and the absence of a showing by Kucinich that coverage of the debate was motivated by partisan purposes, we conclude that the subject debate is a news event and exempt from the equal opportunities requirement.¹¹

8. As a result of the foregoing, the complaint filed by Kucinich is hereby DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Monica Shah Desai
Chief, Media Bureau

¹¹ Furthermore, the Kucinich argument that his exclusion from the debate removes discussion of important contrasting points of view is without merit in light of the repeal of the fairness doctrine over twenty years ago. *Syracuse Peace Council v. WTVH*, 2 FCC Rcd 5043 (1987), *aff'd*, *Syracuse Peace Council v. FCC*, 867 F. 2d 654 (D.C. Cir. 1989), *cert. denied*, 110 S Ct. 717 (1990).